

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BERNARDO COTTO	:	CIVIL ACTION
Petitioner	:	
	:	
vs.	:	
	:	
JAMES S. PRICE;	:	
THE DISTRICT ATTORNEY OF THE	:	
COUNTY OF PHILADELPHIA; and	:	
THE ATTORNEY GENERAL OF THE	:	
STATE OF PENNSYLVANIA	:	
Respondents	:	NO. 98-6479

ORDER

AND NOW, to wit, this 9th day of August, 1999, upon careful and independent consideration of the Petition for Writ of Habeas Corpus of Petitioner, Bernardo Cotto (Document No. 1, filed December 14, 1998), and the related submissions of the parties, and after review of the Report and Recommendation of United States Arnold C. Rappoport dated February 17, 1999, Objection of Petitioner Bernardo Cotto to Report and Recommendations (Document No. 10, filed March 3, 1999), the Response to Petitioner's Objections by Respondent James S. Price (Document No. 11, March 9, 1999), and the related submissions of the parties, **IT IS ORDERED**, for the reasons set forth in the following Memorandum, that

1. The Report and Recommendation of United States Magistrate Judge Arnold C. Rappoport dated February 17, 1999, as supplemented by the attached Memorandum, is **APPROVED AND ADOPTED**;

2. Petitioner's Objections to the Report and Recommendation are **OVERRULED**;

3. The petition for Writ of Habeas Corpus is **DENIED** without an evidentiary hearing;

4. A certificate of appealability will not issue because petitioner has not made a substantial showing of the violation of a constitutional right.

#### MEMORANDUM

#### **I. Facts and Procedural History**

On November 30, 1990, petitioner plead guilty to first degree murder and possessing an instrument of crime, and no contest to two charges of aggravated assault before the Honorable David N. Savitt in the Court of Common Pleas of Philadelphia County. As part of the plea agreement, the Commonwealth agreed not to seek the death penalty, and nol prossed other pending charges. Judge Savitt sentenced petitioner to mandatory life imprisonment for the murder, and lesser concurrent sentences for the other crimes. Petitioner did not appeal.

On July 24, 1995 petitioner sought collateral relief under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. § 9541 by filing a pro se petition, arguing that he did not plead guilty knowingly, intelligently, and voluntarily, and that trial counsel was ineffective. Counsel was appointed, who filed a "no-merit" letter, in accordance with Pennsylvania v. Finley, 481 U.S. 551 (1987). Petitioner filed objections to the Finley letter, stating that counsel had never met with him. On June 6, 1996, following a

telephone conference with petitioner, counsel filed a second Finley letter, which was accepted by the PCRA court. On June 19, 1996, the PCRA court dismissed the petition on the basis of the second Finley letter.

On December 5, 1996, after the time for appeal of the order dismissing his PCRA petition had run,<sup>1</sup> petitioner attempted to file a notice of appeal and a petition for leave to appeal nunc pro tunc. The petition was returned to him on February 14, 1997 with instructions to file the notice of appeal and petition with the trial court. Thereafter, petitioner made numerous attempts to correctly file the notice of appeal and petition for leave to appeal nunc pro tunc, but was ultimately unsuccessful. The record contains no evidence that the petition for leave to appeal nunc pro tunc was ever accepted filing, and it was never granted.

On December 14, 1998, petitioner filed the instant petition seeking federal habeas relief on the following grounds: (1) his failure to exhaust state remedies should be forgiven because the Superior Court failed to grant his appeal nunc pro tunc; (2) his guilty plea was not knowing, intelligent, and voluntary because trial counsel failed to explain adequately the nature of the crimes charged; (3) his guilty plea was not knowing, intelligent, and voluntary because the trial court failed to advise

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<sup>1</sup> Petitioner had thirty days within which to file the notice of appeal. Thus, the time for such action ran on July 19, 1996.

petitioner of the possible sentencing range; (4) petitioner's pleas of no contest to the two charges of aggravated assault were not knowing, intelligent, and voluntary because he denied his guilt and the trial court sua sponte changed the pleas to no contest; (5) petitioner was denied due process and equal protection when the trial court failed to advise him of the time limits to file an appeal and post-verdict motions; and (6) petitioner was denied effective assistance of counsel.

By order dated December 23, 1998, the Court referred the petition to United States Magistrate Judge Arnold C. Rappoport for a Report and Recommendation. On February 17, 1999, Judge Rappoport issued a Report and Recommendation in which he recommended that the Petition for Writ of Habeas Corpus be denied without an evidentiary hearing. Judge Rappoport's recommendation was based on his finding that the petition was not filed within one year of the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2241 et seq., and was therefore time-barred. Petitioner filed objections on March 3, 1999, and the Commonwealth filed a response on March 9, 1999.

## **II. Standard of Review**

Pursuant to 8 U.S.C. § 636(b)(1), the Court may refer Habeas Corpus petitions to a magistrate judge for a "report as to the facts and [a] recommendation as to the order" regarding the appropriate disposition of the petition. The district court is

directed to independently consider and review de novo the magistrate judge's report and recommendation. See id.

### **III. Analysis**

The AEDPA provides that "[a] 1-year period of limitation shall apply to an application for a Writ of Habeas Corpus . . . [which] shall run from the latest of -- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review . . . ." 28 U.S.C. § 2244(d)(1). However, the AEDPA also provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period limitation . . . ." Id. § 2244(d)(2).

The one-year statute of limitations applies prospectively, permitting petitioners a one-year "grace period" following the effective date of the AEDPA, April 24, 1996. Burns v. Morton, 134 F.3d 109, 111 (3d Cir. 1998). Absent a basis for tolling the one-year period, petitioner had until April 24, 1997 to file his federal habeas petition.

Petitioner did not file a timely appeal of the denial of his July 24, 1995 PCRA petition, and he did not file his habeas petition until December 14, 1998, well after the end of the grace period. However, petitioner argues that this failure to meet the deadline resulted from the state court's denial of his petition for

leave to appeal the denial of his July, 24, 1995 PCRA nunc pro tunc. Thus, the issue before the Court is whether petitioner's attempts to file a petition for leave to appeal nunc pro tunc, which was never properly filed in state court, tolls the AEDPA's one year statute of limitations. The Court concludes it does not.

In the only Third Circuit decision addressing this issue to date, the circuit court held that a "properly filed" PCRA petition is one which is "permissible under state law," which means that it is "submitted according to the state's procedural requirements, such as the rules governing the time and place of filing." Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998).

Under Pennsylvania law, where a PCRA petition is denied at the trial level, the decision must be appealed within 30 days. Pa.R.A.P. 903. Petitioner did not appeal the denial of his initial PCRA petition within that period. Instead, beginning December 5, 1996, he attempted unsuccessfully to file a petition for leave to appeal nunc pro tunc. Petitioner now argues such attempts should toll the one-year statute of limitations of the AEDPA. The Court disagrees.

Initially, the Court notes that a petition for allowance of appeal nunc pro tunc is addressed to the discretion of the court; it is not a right. "[O]nly where there are circumstances such as ineffectiveness of counsel, fraud, or a breakdown in the

court's operations is an appeal nunc pro tunc justified." Commonwealth v. Frazier, 471 A.2d 866, 868 (Pa.Super.Ct. 1984).

It is clear from the record that the PCRA petition at issue in this case was not pending after July 19, 1996. That is the date on which the time for appealing the June 19, 1996 denial of his PCRA petition expired. Petitioner argues that his later attempts to file a petition for allowance of appeal nunc pro tunc confers "properly filed" status on the PCRA petition. It does not do so. Although the granting of a petition for allowance of appeal nunc pro tunc may effect the timeliness of a federal habeas action, that issue is not before the Court because the petition for allowance of appeal nunc pro tunc was not granted. Thus, the Court concludes that the petition for Writ of Habeas Corpus is not timely under 28 U.S.C. § 2244(d) and must be denied.

#### **IV. Conclusion**

For the foregoing reasons, the Court adopts the Report and Recommendation of Magistrate Judge Rappoport in which it was recommended that the Petition for Habeas Corpus be denied without an evidentiary hearing, and denies the petition as untimely.

**BY THE COURT:**

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**JAN E. DUBOIS, J.**